

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

MICHAEL JAMES SMITH,

Defendant-Appellee.

UNPUBLISHED

April 26, 2007

No. 269238

Wayne Circuit Court

LC No. 05-010933-01

Before: Cavanagh, P.J., and Jansen and Borrello, JJ.

PER CURIAM.

The prosecutor appeals as of right from sentences of five years' probation imposed on defendant's convictions of using a computer to communicate with another person for the purpose of committing third-degree criminal sexual conduct with a perceived minor, MCL 750.145d(2)(f), and arranging for child sexually abusive activity, MCL 750.145c(2). We vacate the sentence and remand for resentencing. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

According to the presentence report, an adult male deputy was posing as a 13-year-old girl in internet chat rooms. The girl was contacted by defendant, sent her a sexually explicit photograph, and asked for an explicit sexual act. They arranged to meet at a local 7-Eleven store, where defendant was arrested when he arrived. According to the trial transcript, defendant gave a statement in which he admitted that he was the person who had contacted the girl and that he had arranged to meet her for sex. A computer was confiscated from defendant's home. A forensic analysis of the hard drive showed that the computer had been used to chat with the girl. The computer charge was predicated on defendant's soliciting the girl for sex. The sexually abusive activity charge was predicated on defendant's plan to take sexually explicit pictures of the girl. The court found defendant guilty as charged.

Defendant appeared for sentencing on February 21, 2006. He requested probation. The prosecutor advocated "a guidelines sentence[.]" The court stated that it would "adopt the recommendation of the probation department of five years probation." The court did not disclose whether the sentence constituted a departure from the guidelines.

The application of the statutory guidelines is reviewed de novo on appeal. *People v Cook*, 254 Mich App 635, 638; 658 NW2d 184 (2003). This Court reviews the scoring to determine whether the sentencing court properly exercised its discretion and whether the

evidence adequately supported a particular score. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003), lv den 469 Mich 1045 (2004).

The trial court must impose a minimum sentence within the sentencing guidelines range unless a departure from the guidelines is permitted. MCL 769.34(2). A plain error in the scoring of the guidelines which results in a sentence outside the appropriate guidelines range is subject to correction on appeal even if not raised below. *People v Kimble*, 470 Mich 305, 310; 684 NW2d 669 (2004). An error in the scoring of the guidelines which results in a sentence outside the appropriate guidelines range requires resentencing. *People v Francisco*, 474 Mich 82, 91-92; 711 NW2d 44 (2006).

The record contains two sentencing information reports (SIRs). The first SIR classified the computer offense as a crime against public trust, scored the offense variables in accordance with MCL 777.22(4), and determined that defendant was in the A-II category, making the guidelines range 12 to 20 months. MCL 777.63. If those guidelines were correct, the court was authorized to impose a sentence of probation. MCL 769.34(c). The second SIR properly classified the computer offense as a crime against a person, MCL 777.16g(2); MCL 777.16y, scored the offense variables in accordance with MCL 777.22(1), and determined that defendant was in the C-I category, for which the guidelines range is 24 to 40 months. MCL 777.63. If those guidelines were correct, the court was required to impose a prison sentence within that range unless it found a substantial and compelling reason for a downward departure and placed that reason on the record. MCL 769.34(2) and (3).

The record does not indicate which SIR the trial court utilized at sentencing. To the extent that the trial court relied on the first SIR, that SIR contains a plain scoring error. The court failed to score ten points for prior record variable (PRV) 7, despite the undisputed existence of a concurrent conviction. MCL 777.57(1)(b). Depending on the scoring of offense variable 10, MCL 777.40, which was scored at 15 points in the first SIR and at zero points in the second SIR, correction of the scoring of PRV 7 would place defendant in the C-I category, making the guidelines range 24 to 40 months, or in the C-II category, making the guidelines 30 to 50 months. MCL 777.63. Further, to the extent that the trial court relied on the second SIR, it did not articulate any basis for a downward departure. Accordingly, we conclude that resentencing is required.

Defendant's sentence is vacated and the case is remanded for recalculation of the guidelines and resentencing in accordance with MCL 769.34(2). On remand, the trial court shall also correct the presentence information report, which erroneously indicates that defendant was convicted by plea.

Remanded for resentencing. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Stephen L. Borrello